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Supreme Court, U.S.
FILED
MAR 8 - 1995
OFFICE OF THE CLERK

No. 94-1004

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATHANIEL WHITE, PETITIONER

v.

ROBERT RUBIN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that equitable principles did not excuse petitioner's failure to file a notice of appeal with the EEOC within 20 days of receiving notice of the agency's final decision denying his claims of employment discrimination based on race and sex.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 31 F.3d 474. The district court's order (Pet. App. D1-D2) and the magistrate's recommendation (Pet. App. C1-C22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1994. A petition for rehearing was denied on September 8, 1994. Pet. App. E1-E2. The petition for a writ of certiorari was filed on December 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an agent for the Department of the Treasury, Internal Revenue Service (the agency), filed an administrative complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that his race and sex were improperly considered in agency employment practices,[1] and that he failed to receive a promotion to a higher grade because of the alleged discriminatory conduct. Pet. 6-9. Petitioner received a hearing before an Equal Employment Opportunity Commission (EEOC) administrative judge (AJ) on June 11 and 12, 1991. The AJ concluded that petitioner's claim was unfounded. Pet. App. A1.

2. Before issuing a final decision, the agency sent petitioner the transcript of the proceedings, the AJ's recommended decision, and a written request that petitioner review those documents and comment, if he so desired, on the recommendation within seven days from the date he received the materials. Pet. 14-15; Pet. App. I1-I3. Within the allotted time, petitioner notified the agency that he did not believe the hearing transcript was a verbatim record of the proceedings as required by 29 C.F.R. 1613.218(h), and asked the agency to compare the transcript to the original recording of the proceedings before it issued a final decision. Pet. App. J1-J2. Petitioner also listed several bases on which he disagreed with the AJ's recommendation. *Id.* at J2-J5.[2] Petitioner

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[1] Petitioner, a black male, claimed that his immediate supervisor, an Asian-American female, discriminated against him with respect to assignment of duties, duty hours, evaluations, and working environment. Pet. 6-9.

[2] None of the disagreements with the AJ's decision mentioned by petitioner in his letter of December 20, 1991, were related to his allegation that the transcript was not verbatim. Petitioner did not

wrote another letter to the agency on January 16, 1992, requesting the "electronic tape recording" of the proceedings and reiterating his request for a comparison between the transcript and the original recording. *Id.* at K1-K3.[3]

3. On February 4, 1992, the agency adopted the AJ's recommendation and issued a final agency decision denying petitioner's employment discrimination claim. The agency noted that, in reaching its decision, it had considered the comments submitted by petitioner regarding the AJ's decision. Pet. App. M4. Petitioner received notice of the agency's final decision on February 8, 1992. In accordance with 29 C.F.R. 1613.221(b)(1) and (2), that notice included a copy of the AJ's recommendation and a statement informing petitioner of his right to seek review of the agency's decision pursuant to 29 C.F.R. 1613.233. Pet. 18; Pet. App. M1-M4. The appeal-rights notice included an excerpt from 29 C.F.R. 1613.233, which provides that review of an agency decision can be obtained by filing suit in a district court within 90 days of petitioner's receipt of notice of the agency's final decision, or by filing a notice of appeal

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describe specific transcript inaccuracies at that time and has yet to do so.

[3] Petitioner received a written response to his January 16 request for a copy of the audio tape and a review of the transcript on March 2, 1992. The agency informed petitioner that it did not contract for audio tapes of hearings and could not fulfill petitioner's request. Pet. App. N1. The agency went on to note that, in any event, petitioner had failed to cite any specific inaccuracies in the transcript and had failed to allege any errors that would have a material effect on the case. The agency also informed petitioner that he was free to raise the issue with the EEOC if he chose to pursue an appeal from the final agency decision. *Id.* at N2-N3.

with the EEOC within 20 days after receipt of that notice. See 42 U.S.C. 2000e-16(c) (Supp. V 1993); 29 C.F.R. 1613.233(a); see also Pet. App. A2.

4. Petitioner appealed the agency's final decision to the EEOC on April 8, 1992, 60 days after he received notice of that decision. Pet. 35-36. Because petitioner was required to file a notice of appeal with the EEOC within 20 days, the EEOC dismissed that appeal as untimely. Pet. App. A2. On August 21, 1992, petitioner filed suit in the United States District Court for the Northern District of Illinois, seeking review of the EEOC's decision. *Id.* at C10. The matter was referred to a magistrate who recommended that the EEOC's dismissal be affirmed. *Id.* at C20-C21. The district court overruled petitioner's objections to the magistrate's report, adopted the magistrate's recommendation that the appeal to the EEOC was untimely, and dismissed petitioner's action. *Id.* at D1-D2.

5. The court of appeals held that the regulatory time limit for filing an administrative appeal to the EEOC set out in 29 C.F.R. 1613.233(a) was not jurisdictional, but rather, like a statute of limitations, was subject to equitable tolling and estoppel. Pet. App. A2-A3. Rejecting petitioner's argument that his delay in filing was justified by his need to investigate inaccuracies in the transcript, the court concluded that "[t]he standard grounds of equitable tolling and estoppel" were absent in petitioner's case. *Id.* at A4. The court found that petitioner

> was well aware of the time available and able to act within that bound. * * * [Petitioner] does not contend that the IRS misled him in any way about the applicable deadlines or prevented him from initiating the process before the EEOC. * * * [He]

> was told exactly what to do and when to do it. One who decides to follow a schedule of his own devising, for reasons of his own invention, has no legitimate complaint when the tribunal adheres to the rules.

Id. at A3-A4.

ARGUMENT

Petitioner received notice of the agency's final decision denying relief on his discrimination claim on February 8, 1992. That notice included information about petitioner's right to appeal from the agency's final decision. Pet. 33; Pet. App. C5-C7, M2-M4. Petitioner was consequently informed that, in order to appeal the agency's decision to the EEOC, he had to submit a notice of appeal in writing within 20 days of February 8, 1992. Petitioner did not submit such a notice of appeal until April 8, 1992, 60 days after he received the agency's final decision. Pet. 35-36. Petitioner's appeal was therefore untimely pursuant to 29 C.F.R. 1613.233(a).[4]

The EEOC may exercise its discretion to extend the time for filing an appeal if a complainant shows grounds for applying the doctrine of equitable estoppel. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 93 (1990) (holding time limits specified in 42 U.S.C. 2000e-16(c) (Supp. V 1993) for commencing civil actions are subject to equitable tolling). The applicable regulations allow the EEOC to accept an otherwise untimely appeal

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[4] Section 1613.233(a) provides, in pertinent part: "Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked * * *. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal."

"based upon a written statement by the complainant showing that * * * circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit." 29 C.F.R. 1613.233(c); see *Rao* v. *Baker*, 898 F.2d 191, 198 (D.C. Cir. 1990).

Petitioner concedes that he was aware of the 20-day filing period but contends that circumstances beyond his control prevented him from filing a timely notice of appeal. Pet. App. F2. When petitioner filed a notice of appeal with the EEOC on April 8, he argued that "a non-verbatim transcript had been used in making [the agency's final decision]," explained the circumstances surrounding his tardiness in filing, and requested an extension of the filing period. Pet. 36.

Before the EEOC, petitioner claimed that, despite repeated attempts, he was unable to obtain a verbatim transcript from the agency to support his appeal and that he was unable to proceed without the supporting documentation. Section 1613.233, however, allows petitioner 20 days to file a notice of appeal and an additional 30 days to file supporting materials. Petitioner's alleged inability to obtain an "accurate" transcript from the agency by February 28, 1992, did not prevent him from notifying the EEOC of his intent to appeal the agency's decision by that date.[5] As this Court noted in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984), "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."

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[5] The EEOC held that, under the regulations, petitioner "should have notified the Commission that he intended to appeal the agency's [final decision] within the 20-day time period even though he allegedly did not have all of the documents necessary to support the appeal at that time." Pet. App. F3.

Petitioner contends that the agency committed "affirmative misconduct" by leading him to believe that its final decision was based on an accurate transcript, Pet. 30, 37, 45-49, and by failing to inform him otherwise until the 20-day filing period had expired, Pet. 34-35, 38, 44, 54, 64. He argues that such misconduct justified an extension of the filing period. Petitioner claims that, had the agency's final decision been based on a review of an accurate transcript, he would not have appealed the dismissal of his case. Pet. 47.

Petitioner received the transcripts of the proceedings before the AJ on December 13, 1991. As of February 28, 1992, the last day of the 20-day filing period, petitioner had the following information: (1) He believed that the transcripts he received from the agency on December 13, 1991, were inaccurate; (2) he knew that the agency had rendered its final decision in reliance upon the transcripts of the proceedings before the AJ; (3) the agency's final decision did not mention or address petitioner's concerns regarding the accuracy of the transcripts (Pet. 29); (4) he knew that, although he had written three letters, he had not received a response from the agency to his concerns regarding the inaccuracies he perceived in the transcripts (Pet. 31-33); (5) he knew that the two people who transcribed and recorded the proceedings before the AJ were not licensed as court reporters by the State of Illinois (Pet. 17, 25); and (6) he knew that he had only 20 days from February 8, 1992, to file a notice of appeal.

As the court of appeals noted, "[e]rrors in the transcript are reasons to appeal, not reasons to delay appeals." Pet. App. A3. The fact that petitioner was "still gathering details" and collecting evidence to substantiate his claims regarding the inaccuracy of the transcripts did

not prevent him from filing a timely notice of appeal. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1995